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**IN THE
COURT OF APPEALS OF INDIANA**

JOHN E. HENDRIX,)	
)	
Appellant-Respondent,)	
)	
vs.)	No. 40A01-0610-CV-438
)	
MARY E. HENDRIX,)	
)	
Appellee-Petitioner.)	

APPEAL FROM THE JENNINGS SUPERIOR COURT
The Honorable Joseph W. Meek, Special Judge
Cause No. 40D01-0601-DR-9

August 23, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

John Hendrix appeals the amount of the marital estate awarded to his former wife, Mary Hendrix. The trial court's finding John and Mary intended Mary to be sole owner of the farm was supported by evidence. However, the trial court erred because it did not consider all the relevant factors set out in Ind. Code § 31-15-7-5 for which the parties provided evidence. We must therefore remand.

FACTS AND PROCEDURAL HISTORY

John and Mary married in October 1972 and separated in January 2005. Mary filed for dissolution and the marriage was dissolved in June 2006. The court found:

5. John had an affair while he was married to Mary. John has a daughter as a result of that affair. He pays \$5,850.00 per year in child support for the benefit of his daughter.

6. Mary contends that John has dissipated marital assets by paying child support. Based on the evidence and testimony presented, the court finds that paying child support is not a dissipation of marital assets. The court, however, will not give John credit for his child support payments when it determines how Mary and John's assets and liabilities will be divided.

7. Mary works for the Jennings County Area Plan Commission. She earns \$24,544.00 a year. As a benefit of her employment, Mary has a retirement account. The balance of Mary's retirement account on December 31, 2005 was \$8,443.65.

8. John works for Cummins, Inc. In 2005, John earned \$103,637.82. John has a Cummins Retirement and Savings Plan (RSP) account. On April 3, 2006, the balance of John's RSP was \$46,154.49. In addition, John has a pension account with Cummins. The value of that account is \$43,571.36. John also receives a profit sharing bonus from Cummins. The most recent amount of that bonus was \$4,500.00.

9. John's earning capacity is greater than Mary's. In 2005, John earned 4.2 times more income than Mary did.

10. Mary and John lived on a 27 ½ acre farm located at [address omitted]. There is a house, barn and pond on the property. The property has an appraised value of \$163,000.00. The property is secured by a mortgage. As of May 30, 2006 the balance of the mortgage was \$26,174.54.

11. John transferred his interest in the farm to Mary on June 17, 1998. He did this through a properly executed and recorded Quitclaim Deed. It was not clear from the evidence and testimony presented why John transferred his interest in the farm to Mary. It was clear from the evidence and testimony presented, however, that Mary and John intended for Mary to be the sole owner of the farm. It was also clear from the evidence and testimony presented that the transfer was not a post nuptial agreement. As a result, the court finds that the home and farm property are marital assets.

12. Based on the evidence and testimony presented, the court finds that Mary shall keep the following property:

- A. The home and property located at [address omitted]. . . .
- B. All personal property currently in her possession.
- C. The vehicle currently in her possession. . . .
- D. The proceeds from the farm equipment and tractor that Mary sold. John contends that Mary sold the farm equipment and tractor for less than their fair market value. John did not present any credible evidence or testimony to establish the value of the farm equipment and tractor. As a result, the court finds that Mary did not dissipate these assets.
- E. Her retirement account with the Jennings Area Plan Commission.
- F. All bank accounts currently in her name.
- G. \$1,250.00 from the sale of John's boat.
- H. \$25,384.96 (55%) of John's RSP account. . . .
- I. \$23,964.24 (55%) of John's pension account. . . .

13. Based on the evidence and testimony presented, the court finds that John shall keep the following property:

- A. The vehicle currently in his possession. . . .
- B. The personal property currently in his possession.
- C. The "zero turn" lawn mower, the Troy Built rototiller, all his fishing equipment, the trolling motors and their batteries, the tree stands, all his hunting equipment, one of the weed eaters, one of the chain saws, all of his tools, the Kennedy tool boxes, the chain hoist, the freezer, two of the four recliners, one of the two hutches, and his knife collection. Mary shall return all these things to John within 30 days of the date of this Decree of Dissolution.
- D. \$1,250 from the sale of his boat.

- E. The proceeds from all accounts at Centra Credit Union.
- F. \$4,500.00 profit sharing bonus from Cummins.
- G. All bank accounts currently in his name.
- H. The remaining balance in his Cummins RSP account.
- I. The remaining balance in his Cummins pension account.

14. [The court assigned the following debts to Mary: the mortgage on the house and farm, \$1,757.16 in credit card debt, and \$3,101.23 of the debt owed for the vacation package.]

15. [The court assigned the following debts to John: \$5,100.68 in credit card debt, and \$3,101.23 of the debt owed for the vacation package.]

16. Based on the evidence and testimony presented, the court orders Mary and John to sell their interest in the Blue-Green vacation package. The proceeds from that sale shall be used to pay the debt owed to Blue-Green. Any remaining proceeds from that sale shall be divided equally between Mary and John.

17. The court notes that the distribution of property and debts deviates from the presumptive distribution of property and debts contemplated by section 31-15-7-[5] of the Indiana Code. The court finds that this deviation is appropriate since John's earning capacity is greater than Mary's and since there is a significant disparity in their incomes. It is also appropriate given the length of their marriage.

18. The court further notes that John only submitted minimal testimonial evidence in support of his proposal for dividing the parties' assets and debts.

(App. at 5-9.)

DISCUSSION AND DECISION

The disposition of marital assets is an exercise of the trial court's sound discretion. *Hatten v. Hatten*, 825 N.E.2d 791, 794 (Ind. Ct. App. 2005), *trans. denied* 841 N.E.2d 180 (Ind. 2005). We review for an abuse of discretion a claim that the trial court improperly divided marital property. *Id.* In doing so, we consider the evidence most favorable to the trial court's disposition of the property, without reweighing the evidence or assessing the credibility of witnesses. *Id.* An abuse of discretion occurs if the trial

court's decision is clearly against the logic and effect of the facts and circumstances before the court, or if the trial court has misinterpreted the law or has disregarded evidence of factors listed in the controlling statute. *Id.* Although a different conclusion might be reached in light of the facts and circumstances, we will not substitute our judgment for that of the trial court. *Id.*

1. Paragraph 11

John asserts one of the trial court's findings in Paragraph 11 is unsupported by the evidence. That paragraph provides:

11. John transferred his interest in the farm to Mary on June 17, 1998. He did this through a properly executed and recorded Quitclaim Deed. *It was not clear from the evidence and testimony presented why John transferred his interest in the farm to Mary. It was clear from the evidence and testimony presented, however, that Mary and John intended for Mary to be the sole owner of the farm.* It was also clear from the evidence and testimony presented that the transfer was not a post nuptial agreement. As a result, the court finds that the home and farm property are marital assets.

(App. at 6) (emphasis supplied).

John argues: "Apart from the inconsistency of the court determining Husband's intent after deciding that the evidence and testimony were unclear as to why Husband transferred his interest to Wife, is the unsupported conclusion that Husband intended the property to be solely owned by the Wife." (Appellant's Br. at 11.) There was ample support for the court's determination.

Mary filed for divorce in 1996. Shortly before the final hearing, she and John reconciled. Mary testified the transfer of the farm into her name alone was part of their oral reconciliation agreement: "I wanted him to sign the property over to me in an act of

faith that he wouldn't leave me like he did again . . . with nothing . . . for someone else.” (Tr. at 29.) John testified the farm was transferred to Mary as part of the reconciliation agreement and to protect the farm from being taken should John, who “was drinking a lot at the time,” (*id.* at 56), have an alcohol-related accident. Mary admitted John's alcoholism and conviction of driving under the influence were part of the reason for the property transfer. The parties provided alternative reasons for the transfer—infidelity and alcoholism. This supports the trial court's conclusion it was not clear *why* John transferred his interest in the farm to Mary but that the transfer was not a post nuptial agreement. There is evidence to support the finding the parties intended “Mary to be the sole owner.” (App. at 6.)

2. Division of Property

John challenges the court's division of marital property.¹ An equal division of the marital property between the parties is presumed just and reasonable. Ind. Code § 31-15-7-5.

¹ Based on the assets and liabilities to which values were assigned in the court's order, the net marital estate was \$228,934.66. Mary received \$191,009.92 (83.4%) and John received \$37,924.74 (16.6%). However, these amounts do not include various items to which the court did not assign a value, including the personal property in each party's possession, vehicles, individual bank accounts, and all the items listed in Paragraph 13(C). Therefore, this calculation might not accurately reflect the percentage assigned to each spouse.

With respect to the items in Paragraph 13(C), John assigned values to the lawn mower (\$3,500), the rototiller (\$700), the weed eaters (\$250 each), the chain saws (\$100), the damaged toolbox (\$1,000), the big screen TV (\$1,600-\$2,000), and the freezer (\$600). Mary testified she thought the lawn mower was purchased for \$3,100-\$3,200, and the big screen TV for \$1,500-\$1,600. Including these values in the calculation yields an approximate division of 81%-19% in Mary's favor.

The value of the remaining items assigned to John in Paragraph 13(C)—fishing equipment, trolling motors and batteries, tree stands, hunting equipment, tools, and a knife collection—and the effect on the overall division cannot be estimated based the evidence in the record.

However, this presumption may be rebutted by a party who presents relevant evidence, including evidence concerning the following factors, that an equal division would not be just and reasonable:

- (1) The contribution of each spouse to the acquisition of the property, regardless of whether the contribution was income producing.
- (2) The extent to which the property was acquired by each spouse:
 - (A) before the marriage; or
 - (B) through inheritance or gift.
- (3) The economic circumstance of each spouse at the time the disposition of the property is to become effective[.]
- (4) The conduct of the parties during the marriage as related to the disposition or dissipation of their property.
- (5) The earnings or earning ability of the parties as related to:
 - (A) a final division of property; and
 - (B) a final determination of the property rights of the parties.

Id.

When ordering an unequal division of assets, the trial court should consider all the relevant factors set out in the statute. *Eye v. Eye*, 849 N.E.2d 698, 701 (Ind. Ct. App. 2006). While the distribution of marital property is within the sound discretion of the trial court, *Hatten*, 825 N.E.2d at 794, an abuse of discretion occurs when the trial court has misinterpreted the law *or disregards evidence of factors listed in the controlling statute*. *Id.* (emphasis supplied). Relevant evidence of record must be weighed by the trial court in light of the prescribed factors before a proper determination can be made that an unequal distribution is just and reasonable. *Eye*, 849 N.E.2d at 704. If the trial court determines a party opposing an equal division has met his or her burden under the statute, *i.e.*, an equal distribution would not be just and reasonable, and it adequately records its reasons based on the evidence for an unequal division, we will affirm. *Keller v. Keller*, 639 N.E.2d 372, 374 (Ind. Ct. App. 1994), *trans. denied*.

John asserts the trial court abused its discretion in dividing the marital estate because it focused on only one of the factors in the statute, the earning capacity of the parties. “By focusing only upon one factor while others are present, a trial court runs the risk of dividing a marital estate in an unreasonable manner.” *Wallace v. Wallace*, 714 N.E.2d 774, 780 (Ind. Ct. App. 1999), *reh’g denied, trans. denied* 735 N.E.2d 230 (Ind. 2000).

The trial court explicitly determined deviation from the presumptive would be “appropriate,” (App. at 9), based on disparities in earning capacity and income:

17. The court notes that the distribution of property and debts deviates from the presumptive distribution of property and debts contemplated by section 31-15-7-[5] of the Indiana Code. The court finds that this deviation is appropriate since John’s earning capacity is greater than Mary’s and since there is a significant disparity in their incomes. It is also appropriate given the length of their marriage.

(*Id.*)

The court also addressed the parties’ contentions regarding the dissipation of marital assets. In Paragraphs 5, 6, and 12(D) of its order, the court determined neither had dissipated the assets in question. Thus, we may conclude the court considered this factor as well.

However, the trial court did not take into account two other statutory factors -- John’s purchase of the farm prior to the marriage and the parties’ contributions to the acquisition of property during the marriage -- even though there was evidence before it regarding those factors. Thus, it appears the trial court disregarded evidence of factors listed in the controlling statute.

With regard to the purchase of the farm, John testified he bought the farm before the marriage for about \$16,000 and Mary did not contribute to the purchase. Mary was asked if she recalled contributing toward that purchase and she responded: “I . . . at this point I can’t recall that.” (Id. at 104.) Mary testified she believed the price of the farm had been about \$30,000.

As for contributions to the acquisition of property during the marriage, there was evidence Mary and John had a joint account from which Mary paid their bills. Mary contributed her entire paycheck to the account. Her net earnings from Jennings County were \$647.31 every two weeks, or \$323.65 per week. John contributed between \$200 and \$500 per week. Mary testified John contributed more money than usual to the account during the last 12 to 18 months of the marriage because he wanted to pay everything off, get a boat, and retire. Mary wrote the checks out of this account to pay the mortgage, insurance, taxes, utilities, car payments, and other household expenses. The mortgage was taken out to add a room to the marital residence sometime after the farm had been transferred to Mary.

The court noted John “only submitted minimal testimonial evidence in support of his proposal for dividing the parties’ assets and debts,” (*id.* at 9), but we decline to hold the evidence was so insubstantial it rendered the court unable to consider these factors when it divided the marital estate. *Cf. Perkins v. Harding*, 836 N.E.2d 295, 302 (Ind. Ct. App. 2005) (“Because the parties *did not provide evidence* of the value of those items, the

court was unable to divide the estate precisely in half. . . . In light of the state of the record before us, we find no error attributable to the court.”) (emphasis supplied).²

Even if we accept the court’s characterization of the evidence John offered as “minimal,” it is apparent the record was not, as in *Perkins*, devoid of evidence on those factors. The trial court accordingly was obliged to consider those factors. *See Hatten*, 825 N.E.2d at 794.

CONCLUSION

The evidence supported the findings in Paragraph 11, but the trial court did not properly consider every statutory factor for which the parties offered evidence prior to dividing the marital estate. We must accordingly remand.

Remanded.

SHARPNACK, J., and BAILEY, J., concur.

² Mary argues John is estopped from challenging the distribution, relying on *In re Marriage of Church*, 424 N.E.2d 1078 (Ind. Ct. App. 1981). There, the husband complained the trial court abused its discretion in distributing certain assets without determining their value. We noted prior decisions holding it was an abuse of discretion for a trial court to distribute property without apprising itself of the value of the property. “However, we now recognize that any party *who fails to introduce evidence* as to the specific value of the marital property at the dissolution hearing is estopped from appealing the distribution on the ground of trial court abuse of discretion based on that absence of evidence.” *Id.* at 1081 (emphasis supplied). We stated the proper role of a court in dividing property pursuant to a dissolution is “to review carefully all the evidence and then to divide the property based on a consideration of the [statutory] factors” *Id.* at 1082. We decline to find estoppel as to those factors for which John introduced evidence.